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IN THE

Supreme Court of The United States

October Term 1965

No. 879

MEYER GLAZER,
Petitioner

v.

LOUIS JOSEPH BOVE,
Respondent

Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

---

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Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

---

Petitioner, Meyer Glazer, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered in the above-styled case on October 6th, 1965.

OPINIONS BELOW

No formal opinions were rendered either by the Court of Law and Chancery of the City of Norfolk, Virginia, or the Supreme Court of Appeals of Virginia. The Court of Law and Chancery of the City of Norfolk, Virginia, stated some of its reasons for overruling the plaintiff's motion to set aside the verdict of the jury in a letter dated April 2nd, 1965. In addition, further reasons of the Court in not allowing certain questions to be asked on *voir dire* were

set forth orally. None of this material has been published but is included in Appendix "A" and "C" to this petition.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was pronounced on October 6th, 1965. The jurisdiction of this Court is invoked under 28 U.S.C.A., Sect. 1257(3).

QUESTIONS PRESENTED

I. WHETHER THE PETITIONER WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE CONSTITUTION OF THE UNITED STATES WHEN THE VOIR DIRE EXAMINATION OF THE VENIREMEN WAS DRASTICALLY RESTRICTED BY THE TRIAL JUDGE.

II. WHETHER THE PETITIONER WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE CONSTITUTION OF THE UNITED STATES WHEN THE TRIAL JUDGE ARBITRARILY REFUSED TO PERMIT POST-VERDICT INTERROGATION OF MEMBERS OF THE JURY UPON DISCOVERY THAT ONE OF THE JURORS HAD GIVEN A FALSE ANSWER TO A QUESTION ASKED ON VOIR DIRE EXAMINATION AND THAT HE HAD BEEN DISCHARGED FROM EMPLOYMENT BY THE PLAIN-

TIFF BEFORE THE TRIAL OF THE CASE.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution, Sect. 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States in the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Virginia Constitution Amend., Sect. 11:

"That no person shall be deprived of his property without due process of law; and in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five in cases cognizable by justices of the peace, or to not less than seven in cases not so cognizable."

Virginia Code Ann., Section 8-199:

"Interest, bias, etc., of person called as juror.—The court shall, on motion of either party in

any suit, or may, of its own accord, examine on oath any person who is called as a juror therein to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that cause."

Virginia Code Ann., Section 8-202:

"Irregularity cured by verdict.—No irregularity in any writ of venire facias or in the drawing, summoning, returning or empaneling of jurors shall be sufficient to set aside a verdict unless the party making the objection was injured by the irregularity or unless an objection specifically pointing out such irregularities was made before the swearing of the jury; and no judgment shall be arrested or reversed for the failure of the record to show that there was a venire facias unless made a ground of exception in the trial court before the jury is sworn."

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY OF THE CASE AND FACTS MATERIAL TO THE QUESTIONS PRESENTED.

This action was brought as the result of an accident which occurred on November 5th, 1963, in

which the petitioner, Meyer Glazer, a pedestrian, was struck by an automobile driven by the respondent, Louis Joseph Bove. The case was tried on May 28th and 29th, 1964, and there was a direct conflict of testimony between the petitioner and the respondent as to just where the petitioner was when he was struck by the respondent's automobile. The petitioner maintained that he was in a proper pedestrian cross-walk (Appendix C-3, C-4), while the respondent maintained that he was not (Appendix C-4).

At the outset of the trial, counsel for the petitioner submitted to the trial judge a list of twelve questions which, pursuant to the Virginia practice set forth in Virginia Code Ann., §8-199, he requested the trial judge to ask the veniremen on voir dire examination. This list of questions is set out in the appendix to this petition (Appendix A-3, A-4). The trial judge refused to ask the following requested questions:

8. Have you ever made a claim against anyone, or has anyone made a claim against you, for damages arising out of an automobile accident?

10. Are you a shareholder, stockholder, director, officer, employee, policy holder, or in any manner interested in any insurance company issuing policies for protection against liability for injury in connection with damages to persons or to property?

11. Have you any prejudice against actions in the nature of this one?

12. Do you have any prejudice against attor-

neys recovering as their fee in a case of this nature a portion of the amount recovered?

The other requested questions were asked and the veniremen responded to each with a negative reply.

Among the questions that were asked was the following:

5. Have you ever had any business dealings with either of the parties to this action or with the attorneys for either of them?

After all the evidence was in, the jury retired to the jury room and later returned a verdict in favor of the respondent. A few days after the verdict, the petitioner discovered that one of the jurors, a man by the name of Roy Miller, had indeed had business relations with the petitioner in the past which were most unsatisfactory. In fact, they had resulted in the petitioner being forced to discharge this particular gentleman because of what the petitioner felt was a serious neglect of his responsibilities. The petitioner had not realized who this man was because all his contacts with him had been either by telephone or by letter, because he did not ever know his first name, and because the name Miller was such a common one. Upon discovery of this juror's identity the petitioner filed an affidavit with the court and later moved to interrogate this juror and other members of the jury to determine whether his presence on the jury had prejudiced the petitioner's case. The trial judge refused to allow any interrogation of any of the jurors, basing his decision on the principle that the sanctity of the jury room should not be disturbed (Appendix A-2, A-3).

On May 24th, 1965, the trial judge entered an order overruling the petitioner's motion to examine the jurors and for a new trial. A petition for a writ of certiorari was filed with the Supreme Court of Appeals of Virginia and on October 6th, 1965, the petition was rejected and the judgment of the trial court was affirmed by the Supreme Court of Appeals of Virginia.

II. FEDERAL QUESTIONS RAISED BELOW IN TRIAL COURT AND BEFORE THE SUPREME COURT OF APPEALS OF VIRGINIA

The Federal questions sought to be reviewed here were raised in the court of the first instance (Court of Law and Chancery of the City of Norfolk, Virginia) at the trial of the case where plaintiff's counsel objected to the trial court's refusal to ask certain questions on voir dire on the grounds that such refusal amounted to a denial of due process. (Appendix C-1) and in plaintiff's Grounds for Motion for a New Trial where it was stated that there had been a failure to obtain a jury that was impartial in violation of the Constitution of Virginia and the Constitution of the United States. (Appendix B-3, B-4).

The questions were raised in the Supreme Court of Appeals of Virginia by assignments of error in which the petitioner asserted at p.45 of the Record that:

> 6. The Court erred in refusing to ask certain questions of the jury on voir dire, these questions being specifically marked with a cross mark on

a memorandum filed with the Court and being numbered questions 8, 10, 11 and 12.

7. The Court erred in ruling that counsel for the plaintiff could not call the juror, Roy Miller, and interrogate him to show that his presence on the jury injured and prejudiced the plaintiff.

8. The Court erred in refusing to grant a new trial to the plaintiff when evidence was presented that the juror, Roy Miller, had had prior unsatisfactory business dealings with the plaintiff, although Mr. Miller did not disclose this when specifically asked about it on voir dire.

The Federal questions were argued in the petition for a writ of error and oral argument in support of a writ of error.

REASONS FOR GRANTING THE WRIT

I. THE PETITIONER WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE CONSTITUTION OF THE UNITED STATES WHEN THE VOIR DIRE EXAMINATION OF THE VENIREMEN WAS DRASTICALLY RESTRICTED BY THE TRIAL JUDGE.

The questions which the trial judge refused to ask read as follows:

"Have you ever made a claim against anyone, or has anyone made a claim against you, for damages arising out of an automobile accident?"

"Are you a shareholder, stockholder, director, officer, employee, policy holder, or in any manner interested in any insurance company issuing policies for protection against liability for injury in connection with damages to persons or to property?"

"Have you any prejudice against actions in the nature of this one?"

"Have you any prejudice against attorneys recovering as their fee in a case of this nature a portion of the amount recovered?"

The petitioner maintains that by refusing to ask the above questions the trial judge made it impossible for petitioner to ascertain whether or not the jurors actually did have any bias or prejudice against the plaintiff. *Virginia Code Ann.* Section 8-199. By refusing to grant a writ of error the Supreme Court of Appeals of Virginia affirmed the action of the trial judge in refusing to ask the requested questions, and indeed this action is in line with their recent decisions in this area. *Jackson* v. *Prestage,* 204 Va. 481, 132 S.E. 2d 501 (1963); *Davis* v. *Sykes,* 202 Va. 952, 121 S.E. 2d 513 (1961); *Melvin* v. *Commonwealth,* 202 Va. 511, 118 S.E. 2d 679 (1961).

The many valid reasons for requiring that a full and fair interrogation of jurors on their *voir dire* examination are effectively set out in a recent Third Circuit case. In *Kiernan* v. *Van Schaik,* 34 L.W. 2019 (3rd Cir., June 24, 1965), the trial court had refused to ask the following questions:

"1. Are any of you employed by or stockhold-

ers in an insurance company which is engaged in the casualty insurance business?

"2. Are any of you engaged in the general insurance agency business or are any of you an agent for a casualty insurance company?

"3. Have any of you ever worked as a claims investigator or insurance adjuster? . . ."

In holding such refusal an abuse of discretion, the United States Court of Appeals for the Third Circuit stated:

". . . What is here involved is the permissible substantive content of the *voir dire* examination. In this, too, as well as in the procedural area, a wide discretion necessarily resides in the trial court which is familiar with the nature of the case, the demeanor of the prospective jurors and the general circumstances which surround the opening of the trial. This 'broad discretion as to the questions to be asked' on voir dire is 'subject to the essential demands of fairness.'

"The questions were rejected because of the court's reliance on an existing local practice of a limited *voir dire* examination which denies its use to assist counsel in the exercise of the right of peremptory challenge (See colloquy at R. 11) and drastically curtails it in aid of the right of challenge for cause. The rejection of appropriate questions on voir dire for such erroneous reasons amounts to an abuse of discretion. See *Bailey* v. *United States*, 53 F. 2d 982 (5 Cir. 1931). A jury's impartiality may not be as-

sumed without inquiry, as in the case of a judge. Jurors are drawn from the general body of the community for a short term of service, usually lasting a few weeks, and then return to their customary occupations with neither training nor traditions of impartiality. They must often be unaware of their own disqualification in specific cases, especially since the standards for jury service differ in various parts of the country. Litigants therefore have the right, at the least, to some surface information regarding the prospective jurors. Such information may uncover ground for challenge for cause . . . ."

". . . In following a local custom which forbids *voir dire* examination in aid of peremptory challenge and in effect denies it in aid of challenge for cause the court below deprived the plaintiffs of a necessary and important right, recognized as such by the Supreme Court as recently as *Swain* v. *Alabama,* 380 U.S. 202 (1962) . . . ."

". . . A local practice forbidding detailed *voir dire* may not be sustained because of the availability of reports of private investigators. To conclude otherwise would be to confuse cause and affect. For it is when the door of inquiry is closed in busy courtrooms that the pressure of need breaks open in private investigations conducted outside the courtroom. The practice recognized by the Court below would in general reward the lawyer who specializes in accident or other litigation at the expense of the general practitioner. The availability, and even the use—as here—of investigation reports

by both parties, is not adequate ground for permitting them to replace voir dire. For they are private, nonjudicial inquiries. The impartiality of jurors should be tested under the control of the court rather than by the unsupervised activity of investigators with all the undesirable possibilities of intimidation and jury tampering which such surveillance inevitably presents.

"The trial judge required some prima facie showing of the connection of a prospective juror with the business of insurance. Many decisions in the United States have considered the reference to insurance on *voir dire* examination. In most of them some inquiry is permitted although this is usually accompanied with the requirement that counsel must act in good faith. Provided the so-called good faith is shown, counsel has been permitted in many cases to inquire regarding the juror's connection with the insurance business in general, or with the insurance company interested in the specific case, and even whether an individual juror was himself insured and, if so, with what company.

"To us these efforts to deal with the problem seem unsatisfactory. They fail to reflect adequately the significance of bias, which may assume a variety of forms of involvement beyond a crudely direct financial interest in the result. We are therefore required to fashion, if possible, a rule which fairly protects the right to an adequate voir dire examination and yet safeguards the principle which restricts disclosure that a defendant is insured.

"The policy against disclosure to the jury of a defendant's insurance is founded on the view that knowledge of its existence would overthrow the requirement of fault as the foundation for negligence liability and moreover would result in extravagant verdicts. We need not now re-examine this policy. It is based on the desire to assure a fair trial to a defendant, and it may not be permitted to destroy the plaintiff's equal right to a fair trial. A fair trial for a plaintiff in an accident case pre-supposes the right to a *voir dire* examination without any crippling limitations imposed by an over-extension of the rule against disclosure that the defendant is insured. That men will be prone to favor that side of a cause with which they identify themselves either economically, socially or emotionally is a fundamental fact of human character. *It is not enough, therefore, to grant the rights of peremptory challenge and challenge for cause and then limit the factual basis for their use to the visible appearance of the jurors and the scant information on the jury list of their residence and occupation.* (italics added) While the practical limitations of a trial make it impossible to permit the parties on *voir dire* to penetrate deeply into the minds and emotions of prospective jurors, which are far too subtle and complex to be fully judged by surface scrutiny, at least the visible ties which generally bind men to one side of a cause are clearly within the limited range of appropriate interrogation on voir dire . . . ."

". . . in an accident case the inquiry whether a prospective juror is a stockholder or employee

of a casualty insurance company or is employed as a claims investigator or insurance adjuster, or is an insurance company agent, is relevant in ascertaining bias against one claiming damages for negligence. A juror's identification with the business of investigating and paying damage claims affects his impartiality as significantly as does a juror's employment by a lawyer who is a specialist in prosecuting such claims. Such a relevant matter may not be shut out because it deals with insurance. The word 'insurance' is not outlawed from the courtroom as a word of magical evil. Jurors are not unaware that insurance is at large in the world, and its mention will not open to them a previously unknown realm. It is in fact more realistic for the judge to dissolve the phantom by open talk in the courtroom than to have it run loose in the unconfined speculations of the jury room. The court has wide control over the voir dire and can adequately safeguard the inquiry by explaining to the jurors the limited scope and purpose of the examination and thus eliminate any implication of the existence or relevance of insurance in the case before it.

"We hold, therefore, that in order to exercise intelligently his limited number of peremptory challenges and to determine whether ground exists for challenge for cause, a plaintiff in an accident case may make reasonable inquiry whether prospective jurors are or have been connected with the business of investigating or paying accident claims, either as employees, agents, or stockholders of insurance companies or claims agencies without suggesting the exist-

ence of insurance in the case. An adequate caution should be given by the court to make it clear to the jury that these questions do not imply either that any defendant is insured or that the matter of insurance or lack of insurance is to be considered in reaching a verdict."

The severe restrictions placed on *voir dire* examination under present Virginia practice prevents litigants from determining whether a proper jury is being established. The petitioner in this case was prevented from ascertaining a number of critical points of information to which he was entitled under the most basic concepts of due process of law and equal protection of the laws.

While it is true that the states are not required by the Fourteenth Amendment to grant a civil jury trial, *Walker* v. *Sauvinet,* 92 U.S. 90 (1875); *Chappell Chemical and Fertilizer Co.* v. *Sulpher Mines Co.* 172 U.S. 472 (1899), the State of Virginia in its constitution grants the right to a jury in a civil action. *Virginia Constitution* Section 11. Since this right is expressly granted to the petitioner by the Virginia Constitution it may not be arbitrarily denied through judicial action. Such a denial amounts to a denial of due process and equal protection of the laws and for this reason alone the action of the trial judge in this matter and of the Virginia Supreme Court of Appeals in affirming that decision should be reversed.

II. THE PETITIONER WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS OF THE CONSTITUTION OF THE UNITED STATES WHEN THE TRIAL JUDGE

ARBITRARILY REFUSED TO PERMIT POST VERDICT INTERROGATION OF MEMBERS OF THE JURY UPON DISCOVERY THAT ONE OF THE JURORS HAD GIVEN A FALSE ANSWER TO A QUESTION ASKED ON VOIR DIRE EXAMINATION AND THAT, THAT JUROR HAD BEEN DISCHARGED FROM EMPLOYMENT BY THE PETITIONER BEFORE THE TRIAL OF THE CASE.

It cannot be denied that there is a broadly accepted rule, particularly in Virginia, that the sanctity of the jury room should not be disturbed by allowing into evidence the affidavits or testimony of jurors regarding their deliberations in the jury room. *Phillips* v.*Campbell,* 200 Va. 136, 104 S.E. 2d 765 (1958).

However, this rule carries with it a number of well recognized exceptions: Affidavits or testimony of jurors are admissible to show that an unauthorized view was taken by one of the jurors *and to show that as a result of this unauthorized view the party complaining was prejudiced. Litz* v. *Harmon,* 151 Va. 363, 144 S.E. 477 (1928) (New trial granted by trial court after hearing testimony of jurors. Affirmed.); *Hickerson* v. *Burner,* 186 Va. 66, 41 S.E. 2d 451 (1947) (New trial denied by trial court after hearing testimony of jurors. Affirmed.); *McGuire* v. *Howard,* 203 Va. 965, 128 S.E.2d 281 (1962) (New trial denied by trial court after hearing testimony of jurors. Reversed as abuse of discretion and new trial ordered.). Likewise testimony of jurors is properly admissible to show that private communications between jurors and a third party took place during the trial. *Dozier* v.

Morrisette, 198 Va. 37, 92 S.E. 2d 366 (1956). And when the question of a juror's qualification to serve is questioned because of a false answer given on *voir dire* examination, and evidence is definitely produced to show that the false answer was given, then testimony of the juror in question and others should be admitted to show the circumstances surrounding the false answer and its prejudicial effect on the losing party. *Temple* v. *Moses* 175 Va. 320, 8 S.E. 2d 262 (1940) (Juror stated on *voir dire* he had formed no opinion in case. After verdict affidavit of witness states juror had formed and expressed firm opinion just prior to trial. Trial Court took affidavit and testimony from juror denying that he had formed opinion. No new trial granted. Affirmed.); *Pitchford* v. *Commonwealth,* 135 Va. 654, 115 S.E. 707 (1923) (Juror stated on *voir dire* that he had no prejudice against defendant and had not formed any opinion. After verdict affidavit of witness stated that two days prior to trial juror had said, "Pitchford ought to be punished." Trial court heard juror's testimony, which did indicate prejudice, but denied new trial. Reversed by this Court as an abuse of discretion. New trial awarded.); *Yellow Cab Corp.* v. *Henderson,* 178 Va. 207, 16 S.E. 2d 389 (1941) (same sequence as in *Pitchford, supra.* After the testimony of the juror was heard, the trial court refused new trial. Affirmed). *Winn* v. *Commonwealth,* 160 Va. 918, 168 S.E. 351 (1933) (Same sequence. After hearing juror's testimony trial court denied new trial. Reversed as an abuse of discretion and new trial granted). Most other jurisdictions also recognize that affidavits or testimony of jurors should be taken where evidence is presented that a juror has given a false answer to a question asked on *voir dire.* See Annotation at 48 ALR

2d 971, ***Admissibility, in civil case, of juror's affidavit or testimony to show bias, prejudice or disqualification of a juror not disclosed on voir dire examination.***

In the case at bar evidence has been presented that establishes beyond question that the juror, Roy Miller, gave a false answer to a *voir dire* question. For the trial judge to have shut off the plaintiff's inquiry into the reason behind this falsehood and the degree of prejudicial effect it had on the juror's deliberations was a flagrant abuse of his discretion amounting to a denial of due process of law and equal protection of the law to the plaintiff. The court should have allowed the juror's testimony admitted. *Kearns* v. *Hall,* 197 Va. 736, 91 S.E. 2d 648 (1956).

Other Virginia cases involving similar circumstances where a juror's testimony has been allowed are: *Lilley* v. *Simmons,* 200 Va. 791, 108 S.E. 2d 245 (1959) *Harris* v. *Hampton Roads Tractor and Equipment Co.,* 202 Va. 958, 121 S.E. 2d 471 (1961); *City of New York Ins. Co.* v. *Greene,* 183 Va. 35, 31 S. E. 2d 268 (1944); *Thompson* v. *Commonwealth,* 193 Va. 704, 70 S.E. 2d 284 (1952).]

The petitioner finds himself in the position of having had his one day in court tainted by the knowledge that the jury charged with the responsibility of considering his case had in its membership at least one person who had every reason to be hostile and biased to the petitioner's cause. Unequivocal proof that the juror, Roy Miller, gave a false answer on his *voir dire* examination has been presented. Yet the petitioner finds himself in the frustrating position of having to prove that Miller's presence on the jury

operated to prejudice the petitioner's case and yet being foreclosed from any interrogation of the jury to find out what effect Miller did have on the jury's deliberations. For the trial judge to have refused to at least to allow interrogation of the jury members was a flagrant abuse of his discretion—abuse so serious as to amount to a denial of due process and equal protection under the United States Constitution. See "Constitutional Law: Rule Prohibiting Impeachment of Verdicts by Jurors as Deprivation of Due Process", 14 Oklahoma Law Review 533 (1961). This Court has itself recognized the folly of blind adherence to the rule that jurors may not impeach their own verdicts as was stated in *United States* v. *Reid,* 53 U.S. (12 HOW.) 361, 365 (1851) and *Mattox* v. *United States,* 146 U.S. 140, 142 (1892).

> It would hardly be safe to lay down any general rule on this subject. Unquestionably such evidence ought always to be reviewed with great caution, but cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice.

From the record in this case it is apparent that the plainest principles of justice have been violated and that the principles involved are of such magnitude as to amply justify the granting of a writ of certiorari in this case.

CONCLUSION

For the reasons stated above this Court should grant a Writ of Certiorari in the above styled case.

Respectfuly submitted,
LOUIS B. FINE
HOWARD I. LEGUM
ALBERT R. TURNBULL
Of Counsel

APPENDIX

APPENDIX "A"

In the Supreme Court of Appeals held at
The Supreme Court of Appeals Building
In the City of Richmond on Wednesday, the
6th day of October, 1965

The petition of Meyer Glazer for a writ of error to a judgment rendered by the Court of Law and Chancery of the City of Norfolk on the 24th day of May, 1965, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Louis Joseph Bove was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affim the judgment of the said Court of Law and Chancery.

A Copy,
Teste:

H. G. Turuir
Clerk

VIRGINIA:

IN THE COURT OF LAW AND CHANCERY
OF THE CITY OF NORFOLK

(Caption omitted)

ORDER

THIS DAY came the plaintiff and the defendant, by their respective attorneys, and the Court having ma-

turely considered the motions heretofore submitted by the plaintiff to set aside the verdict of the jury and grant the plaintiff a new trial, and the affidavits of the plaintiff which were filed after the verdict, and the motion of the plaintiff to examine the jurors to show bias and that the examination on the voir dire was not full and complete, it is now the opinion that both motions should be overruled.

WHEREFORE, it is considered by the Court that the motions to set aside the verdict of the jury be and the same are hereby overruled, and that a judgment in favor of the defendant is hereby rendered in accordance with the jury's verdict, and that the defendant recover the costs in his behalf expended.

To which action of the Court the plaintiff, by counsel, duly excepted as to overruling the motion for a new trial as contrary to the law and evidence, and on the further grounds set out in the affidavits, and in the evidence sought to be introduced after the verdict of the jury was rendered.

A copy, Teste:

/s/ L. M. Calvert, D.C.

Entered: May 24th, 1965.

Letter from The Honorable J. Sidney Smith, Jr., Judge of the Court of Law and Chancery of the City of Norfolk, Virginia,

It is the opinion of the court, after a thorough consideration of the record herein, that the action of the court in granting and refusing the instructions

in question was proper, and that the questions of negligence and contributory negligence were properly submitted to the jury, and that the verdict of the jury is binding upon the court.

For the court to rule otherwise would constitute an arbitrary substitution by the court of its judgment for that of the jury.

The court is also of the opinion that its action was proper in refusing to permit counsel for plaintiff to interrogate the jurors for the reasons and upon the grounds assigned by counsel.

It is the conclusion of the court, therefore, that the motion by defendant to set aside the verdict and award him a new trial should be overruled and judgment entered on said verdict.

An order may be presented for entry in accordance with the foregoing.

/s/ J. Sidney Smith
Dated: April 2nd, 1965.

Q 1 Are you related in any way, either by blood or marriage, to any of the parties to this action?

Q 2 Are you acquainted with either of the parties to this action, or with any members of their families or business associates?

Q 3 Are you related, either by blood or marriage, to either of the attorneys for the parties to this action?

Q 4 Are you related, either by blood or marriage,

to either of the attorneys' immediate families or to any partner or associates of them? (The attorneys are Fine, Fine, Legum, Schwan & Fine and Taylor, Gustin and Harris.

Q 5 Have you ever had any business dealings with either of the parties to this action or with the attorneys for either of them?

Q 6 Are you related to or acquainted with any persons whom you know have been or have reason to believe may be called as a witness in this case?

Q 7 Have you ever been involved in or is there now pending, either by or against you, any litigation growing out of an automobile accident?

Q 8 Have you ever made a claim against anyone, or has anyone made a claim against you, for damages arising out of an automobile accident?

Q 9 Have you heard anything about this case prior to being called as a juror?

Q 10 Are you a shareholder, stockholder, director, officer, employee, policy holder, or in any manner interested in any insurance company issuing policies for protection against liability for injury in connection with damages to persons or to property?

Q 11 Have you any prejudice against actions in the nature of this one?

Q 12 Do you have any prejudice against attorneys recovering as their fee in a case of this nature a portion of the amount recovered?

APPENDIX "B"

Affidavit of Meyer Glazer

This day personally appeared before me, Elsie Martin, a Notary Public in and for the City of Norfolk, in the Commonwealth of Virginia, MEYER GLAZER, the undersigned, who first having been duly sworn, deposes and says:

That one Roy Miller, a member of the jury on May 28th and 29th, 1964 in the Court of Law and Chancery of the City of Norfolk, Virginia, unknown to the undersigned at the time of the selection of the jury, had done business with the undersigned, and had failed to answer affirmatively question number 5 as follows:

> "Q 5 Have you ever had any business dealings with either of the parties to this action or with the attorneys for either of them?"

It appears that the said Roy Miller was employed by the Jock B. Hughes Real Estate Agency who handled a certain residence at number 313—16th Street, Virginia Beach, Virginia, and that the said Roy Miller, unknown to the undersigned, was an agent for an agent, to-wit: Roy Miller, who was the rental agent for the Jock B. Hughes Real Estate Agency, and Jock B. Hughes was employed by the undersigned.

That the undersigned's dealings with the said Roy Miller were highly unsatisfactory in that the said Miller had permitted the tenant to remain on the premises without the collection of rent from September

through December, 1960, and without the payment of any rent, for that period.

That the undersigned did not know who was handling this matter, but spoke to one Mr. Miller, not knowing that this was the same Roy Miller on the jury, and told the said Miller on the telephone, in no uncertain terms, that he would bring action against him for negligence in the manner in which the account was handled, and ordered him to send the key back and not handle the rental any further.

That the undersigned, the said Meyer Glazer, did not know who he was talking to on the telephone, but has since learned that the said Miller is the same man he talked to since the trial of the case in the Court of Law and Chancery of the City of Norfolk, Virginia of Meyer Glazer against Louis Joseph Bove.

That counsel for the undersigned Meyer Glazer was unable to question the juror, Roy Miller, as to question number 10 as follows, by reason of the action of the Court in refusing to permit counsel for the plaintiff to ask the question:

> "Q 10 Are you a shareholder, stockholder, director, officer, employee, policy holder, or in any manner interested in any insurance company issuing policies for protection against liability for injury in connection with damages to persons or to property?"

That since the trial of this case, and the selection of the jury, the undersigned has learned that the said Roy Miller works for the said Jock B. Hughes, and also that the said Jock B. Hughes sells real estate and

is also an insurance agent. Upon answer to the aforesaid question number 10, the said Miller definitely is an employee of an individual or firm that sells insurance, and that the said Miller was listed in connection with his occupation as being in the real estate business and not in the insurance business, while it is true that the said Miller is employed with a firm that not only handles real estate, but also insurance.

/s/ Meyer Glazer

Dated: June 5th, 1965.

VIRGINIA:

IN THE COURT OF LAW AND CHANCERY
OF THE CITY OF NORFOLK

(Caption omitted)

GROUNDS FOR MOTION FOR A NEW TRIAL

For grounds for the motion for a new trial, plaintiff, by counsel, comes and says:

1. That he relies on each and every exception as set out in the transcript of the evidence, and for each and every motion which the Court overruled. In addition, for failure to obtain a jury that was impartial as set out in the Constitution of Virginia and the Constitution of the United States which is a denial of due process.

a. The failure to note that one of the jurors was associated in the insurance business.

b. The failure of a juror to indicate that he had done business with the plaintiff.

c. Newspaper articles with regard verdicts of the jury affecting insurance premiums.

d. The action of the jury in its final verdict.

e. Any and all other matters that may be disclosed by an examination of the jurors.

A copy, Teste:

/s/ L. M. Calvert, D.C.

Filed: January 25th, 1965.

APPENDIX "C"

Excerpts from Transcript of May 28, 29, 1964:

(Tr. pp. 4-5) THE COURT: What is your position with reference to these inquiries, Mr. Harris?

MR. HARRIS: Well, I think one through five are the usual inquiries, your Honor, or very close to them. Six, seven, eight, ten, eleven and twelve I would object to. I think nine is the usual inquiry.

THE COURT: The Court will ask the jury on the voir dire questions one through seven. The Court will also ask Number 9, although, I think that is covered by the usual inquiry. The Court will refuse inquiries Eight, Ten, Eleven and Twelve.

Note your exception, Mr. Fine.

MR. FINE: May it please the Court, we respectfully except to the action of the Court in refusing to ask inquiries Eight, Ten, Eleven and Twelve on the ground that it is for information and for selection of the jury, and that the denial of obtaining this information is a denial of due process, and for that reason, we respectfully except.

* * * *

(Voir dire examination of jury)

(Tr. pp. 6-7) THE COURT: Members of the

Jury, today you are to hear the case of Meyer Glazer, plaintiff, versus Louis Joseph Bove, defendant, which plaintiff is suing the defendant for damages allegedly to have resulted from the personal injuries sustained on November 5, 1963, at the intersection of Granby and York Streets in the City of Norfolk as a result of the alleged negligent operation by the defendant of a motor vehicle at that time and place, at which time and place the plaintiff alleges that he was a pedestrian crossing the street at that intersection.

Are any of you related to any party to this cause by blood or marriage?

Do you have any interest in this cause?

Have you expressed or formed an opinion as to this cause?

Are you sensible of any bias or prejudice herein and are you able to give all parties hereto a fair and impartial trial according to the law and the evidence?

Are any of you acquainted with either of the parties to this cause or with any members of their families or business associates, as far as you know?

Are you related either by blood or marriage to either of the attorneys for the parties to this action?

Are you related either by blood or marriage

to either of the attorneys' immediate families or any partners or associates of the firms of Fine, Fine, Legum, and Schwan, and Taylor, Gustin and Harris?

Have you ever had any business dealings with either of the parties to this action or with the attorneys for either?

Are you related to or acquainted with any person whom you know have been or have reason to believe may be called as a witness in this case?

Have you ever been involved in or is there now pending against you, any litigation growing out of an automobile accident?

Have you heard anything about this case prior to being called as a juror?

You may be seated.

* * * *

(Tr. p. 11) (MEYER GLAZER) Well, I don't know, seven or eight parking meters are probably way down here. I got on the sidewalk and walked close to the windows here right on down as I always do, got to this lamp post that I just mentioned before, which is the beginning of one cross walk mark and the other cross walk mark is almost parallel with the sidewalk.

I walked across this street, this cross walk, in this direction. This is divided in two on Granby Street

and you must manage that. This is divided in two and this is divided in two.

* * * *

(Tr. p. 171) (MR. HARRIS) Q. At any time was Mr. Glazer in any cross-walk?

(MR. BOVE) A. Not at any time that I was aware of.

* * * *

Transcript of March 5, 1965.

(Tr. pp. 6-10) (BY MR. FINE) Q. You are Mr. Meyer Glazer?

A. Yes, sir.

Q. And Mr. Glazer, I hand you a affidavit and I ask you if you executed and swore to this affidavit as indicated therein?

A. Yes.

Q. THE COURT: You better identify that.

BY MR. FINE:

Q Is this the copy that is marked filed by Judge Smith today?

A. Yes.

Q. Now, Mr. Glazer, did you have any difficulties with this Mr. Roy Miller personally?

A. Well, I did, yes, I did.

Q. And did you know that that was the Roy Miller—

A. No, I had never seen him.

Q. You had never seen him?

A. All business was done on the telephone.

Q. Did you know that his first name was Roy Miller?

A. No, I didn't know, I didn't even know his first name, just Mr. Miller.

Q. And your dealings were with him on the telephone, and as far as you were concerned it was a man named Miller?

A. That is correct.

Q. What was the difficulty between you and Mr. Miller, just briefly?

A. I have a piece of property at Virginia Beach that had been vacant for a while and upon recommendation my wife had been having some business relations with the Hughes firm. I contacted them to try to handle this piece of property and this gentleman called me and said he had rented it for me.

And after three or four or five months there had been no rent collected and we had a pretty heated discussion on the telephone. And I dismissed him at the time and that was the last I heard of him.

Q. And what was the difficulty of the collection of the rent from September through December, 1960?

A. There were no rents collected and I got into a controversy or argument with him and told him that I thought he had used bad judgment and maybe he should be made to pay the rent in that he let it go that far. As I think, he returned the key by mail at that time and I had somebody else handle the property for me.

Q. And you did not know who it was?

A. No.

MR. FINE: All right, sir.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Mr. Glazer, do you have any reason to believe that Mr. Miller was prejudiced against you in any way in the trial in this case?

A. I only say that I didn't know the gentleman and I had had an argument with him.

Q. Did he know you or did he have any reason to know who you were?

A. Well, he hadn't seen me but he knew where I lived and I was made to testify where I lived. And he knew he had mailed letters to me at this address. And so I think he had reason to know me where I didn't have reason to know him.

MR. HARRIS: All right.

REDIRECT EXAMINATION

BY MR. FINE:

Q. Did he as a matter of fact bring an action against this man for rent for you?

A. I didn't know it until I went out to get copies of this paper which you have. This is when I found out he brought the action. I didn't even know he brought the action.

Q. I hand you a paper and ask you if this isn't a garnishee?

A. Yes, I recognize it as a garnishee.

Q. Is that the one that Mr. Miller had acted in behalf of you for $425?

A. I didn't even know it.

Q. You didn't even know it until you went back to check it?

A. Until I went to get those copies of the papers.

Q. Does this involve the tenant on the property, a man named Wells?

A. I still haven't seen Mr. Miller. These papers were gotten from his bookkeeper or Mr. Hughes.

Q. From Mr. Hughes' office?

A. I think so.

MR. FINE: Let me get the Judge to mark it and I will give it right back to you.

THE COURT: Exhibit P-4.

(Whereupon the foregoing document was marked for identification as Exhibit P-4)

RECROSS EXAMINATION

BY MR. HARRIS:

Q. In regard to this exhibit, P-4, which you have just introduced, you are not in any way named in that, are you?

A. I don't know.

THE COURT: Look at it and see, it speaks for itself.

MR. HARRIS: Well, it speaks for itself. It shows he is not.

All right, sir.

MR. FINE: All right, sir.

(Witness excused).

MR. FINE: I would like to call Mr. Roy Miller, if your Honor please.

MR. HARRIS: I am going to object.

THE COURT: The Court does not feel it is proper under the rule as laid down on the basis of the discussion of a verdict to allow the

privacy to be invaded of the jurors summoned here and interrogated with relation to their personal conduct. The Jury room, in the absence of something more positive, should not be invaded.

* * * *

(Tr. p. 37) THE COURT: I think I have heard you fully and I feel that the Court must overrule your motion and deny your motion that the jurors be interrogated. Note your exception.

MR. FINE: Would you allow me to put on the testimony of Mr. Hughes?

THE COURT: I assume you will stipulate what you have stated. I am basing my ruling on what you have stated, which she may read back.

MR. FINE: To which action of the Court, counsel for the plaintiff fully and respectfully excepts.

* * * *

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IN THE

Supreme Court of The United States

October Term 1965

No. 879

MEYER GLAZER,
Petitioner

v.

LOUIS JOSEPH BOVE.
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

RESPONDENT'S BRIEF

WILLIAM M. HARRIS
TERRY H. DAVIS, JR.
Attorneys for Respondent
1412 Maritime Tower
Norfolk, Virginia

WITHERS PRINTING CO. - NORFOLK, VA.

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IN THE

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Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

RESPONDENT'S BRIEF

Respondent, Louis Joseph Bove, submits that a writ of certiorari should not issue to the Supreme Court of Appeals of Virginia to review the judgment of that Court entered in the above styled matter on October 6, 1965.

OPINIONS BELOW

Respondent adopts the rulings as shown in the petitioner's Appendix on pages A-1, A-2 and A-3, C-8 and C-9.

JURISDICTION

The respondent respectfully submits that this cause does not raise a Federal question under *28 U.S.C. 1257* or

any other statute over which this Court would exercise jurisdiction. The petitioner failed to raise a Federal issue in the Supreme Court of Appeals of Virginia. The petitioner also failed to properly raise a Federal issue in the Court of Law and Chancery of the City of Norfolk. Assuming that the issues had been properly raised, the petitioner does not state a case to which the Fourteenth Amendment would be applicable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondent agrees that the sections set forth in the petitioner's brief are correctly quoted and that the respondent has no additional constitutional or statutory provisions.

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THIS COURT HAS JURISDICTION IN REGARD TO THIS CAUSE WHEN THE FEDERAL ISSUE WAS NOT RAISED IN THE SUPREME COURT OF APPEALS OF VIRGINIA AND INADEQUATELY MENTIONED IN THE COURT OF LAW AND CHANCERY OF THE CITY OF NORFOLK.

2. WHETHER THE **VOIR DIRE** EXAMINATION IN THIS CAUSE RAISES A FEDERAL QUESTION UNDER THE FOURTEENTH AMENDMENT.

3. WHETHER THE FAILURE OF THE TRIAL JUDGE TO ALLOW THE JURY TO BE INTERROGATED IN THIS CAUSE RAISES A FEDERAL ISSUE UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

STATEMENT OF THE CASE

Respondent agrees with the statement of the case as set out by the petitioner but would add that although the petitioner discovered only a few days after the verdict of the jury on May 29, 1964, that the juror, Roy Miller, had allegedly done business with him some three or four years prior to this case, he did not bring this matter to the attention of the trial Court by way of affidavit until March 5, 1965, more than nine months after trial of the case. (Petitioner's Appendix p. A-2, Respondent's Appendix p. 2a).

ARGUMENT IN SUPPORT OF RESPONDENT'S CONTENTIONS

1. WHETHER THIS COURT HAS JURISDICTION IN REGARD TO THIS CAUSE WHEN THE FEDERAL ISSUE WAS NOT RAISED IN THE SUPREME COURT OF APPEALS OF VIRGINIA AND INADEQUATELY MENTIONED IN THE COURT OF LAW AND CHANCERY OF THE CITY OF NORFOLK.

The petitioner failed to raise a Federal Constitutional issue at the Supreme Court of Appeals of Virginia. On page 7 of the petition, the petitioner states, "The questions were raised in the Supreme Court of Appeals of Virginia by assignments of error in which the petitioner asserted at p. 45 of the Record that:" and thereafter is listed what the petitioner relies upon to raise a Federal question. It can be seen from reading the alleged errors numbered 6, 7 and 8 that the petitioner did not rely upon Federal Constitutional law in any respect. The concluding paragraph of that section of the petitioner's request for a writ concludes with the following: "The Federal questions were argued in the petition for a writ of error and oral argument in support of a writ of error." The petitioner did not at any time raise a

Federal Constitutional issue in his brief in support of the assignments of error to the Supreme Court of Appeals of Virginia. The petitioner relied in the Supreme Court of Appeals of Virginia purely on nonconstitutional law. The petitioner's table of citations in the appeals court quoted in our appendix (pages 2a, 3a, 4a, 5a) amply demonstrates this fact. There was no reference to law contained in the Constitution, federal statutes or treaties. *Beck v. Washington*, 369 U.S. 54 (1962) requires that the federal question relied upon in the petition must have been presented to the State Appellate Court. *Rule 23 1 (f)* is designed to effectuate this requirement. The petition shows that this was not done.

In the trial Court, the petitioner's attorney on page 5, line 5 of the Record, stated that the denial of obtaining this information, "is a denial of due process." There is no indication from that remark as to what exactly the petitioner is relying upon. Of course, the Virginia Constitution requires due process of law. No doubt, there are statutes also requiring due process. The only other reference to Federal Constitutional law in the entire case is found in item 1 as a ground for a motion for a new trial. This is recited at petitioner's Appendix p. B-3. In this instance, he relies upon the Constitution of Virginia and the Constitution of the United States. This Court has held that there is a presumption that the State Constitution is the one upon which the reliance is placed. *New York Ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67-8 (1928). A mere reference to due process refers to the due process clause in the State Constitution, *Bowe v. Scott*, 233 U.S. 658, 664-5 (1914). The respondent submits that the averments to Federal law in the lower Court were not so distinct and positive as to effectively raise that issue in the trial Court as required in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897).

Assuming that the petitioner properly raised the issue in the trial Court, nevertheless, he failed to preserve the issue in his petition for a writ of error to the Supreme Court of Appeals of Virginia. In addition thereto, the petitioner has failed to set out what condition in *Rule 19* that he is relying upon in requesting a review of this decision on certiorari. There is no contention that this case falls within the purview of subsection *1 (a) of Rule 19*. No allegations are found to the effect that an important question of Federal law has been decided or that an important state question has been decided in a matter in conflict with other applicable state or territorial law. No statute of the State of Virginia is attacked. No case decision is attacked for its holding. No United States Supreme Court case is cited with which the decision in this cause is in conflict, nor has there been an allegation that the Court in this case has so far departed from the accepted and usual course of judicial proceedings that the powers of this Court should be exercised. The petitioner does not rely upon the equal protection clause of the Constitution of the United States. The petitioner relies solely upon due process. There is no allegation that the petitioner was treated any differently than anyone else has been treated.

2. WHETHER THE VOIR DIRE EXAMINATION IN THIS CAUSE RAISES A FEDERAL QUESTION UNDER THE FOURTEENTH AMENDMENT.

The petitioner under this subsection quotes for six pages the Third Circuit case of *Kiernan v. Van Schaik*, 347 F. 2d 775 (3rd Cir., 1965). This case is different from ours in that no *voir dire* was allowed in the lower Court in regard to that cause. As seen from the petitioner's Appendix p. A-3 and A-4, the Norfolk trial Court asked questions designed to determine whether or not the jury had any

knowledge of the happening of the accident or any other prejudicial relationships, pursuant to Virginia statutory law (*Code of Va.* (1950) § 8-199 (1957) *Repl. Vol.*). The *Kiernan* case dealt with Federal procedural law and not with the Fourteenth Amendment.

The State of Virginia does not have a compulsory automobile insurance law. There are many individuals who own automobiles who are licensed to drive motor vehicles without any type of insurance. Accordingly, it should not be assumed by jurors that a particular defendant does or does not have insurance. Under case decisions, it is not proper to introduce evidence or by other means to indicate whether or not the defendant is or is not protected by insurance. *Worrell v. Worrell,* 174 Va. 11, 4 S.E. 2d 343 (1939) and *Bradfield v. Board of Education,* 128 W. Va. 228, 36 S.E. 2d 512 (1900). The insurance or lack of it is not an issue in the trial of a negligence suit. It is improper to introduce it as an issue. Clearly, the interrogation of a jury as requested in the petition and as was done in the Third Circuit case tells the jury that the defendant has insurance. Otherwise, how would the questions have meaning? This is clearly not proper under Virginia law. If insurance is properly excluded from the trial of a case, the fact that an individual is associated with an insurance company should not operate to prejudice either party. The Court has allowed employees of the United States to sit as jurors on cases involving the United States.

Petitioner does not contend that *Section* 8-199, *Code of Virginia* (1950) (1957 *Repl. Vol.*) is in violation of either Constitution or that the trial Judge failed to comply with it. (The statute is found on page 3 of the petition.) The Court of Appeals of Virginia had ample opportunity to determine whether or not the trial Judge had erred under State law. The Court was of the opinion that the trial

Court was correct in its ruling.

States have been free under the Fourteenth Amendment to abolish juries. *Walker v. Sauvinet*, 92 U.S. 90 (1876); *New York C.R. Co. v. White*, 243 U.S. 188, 208 (1917) and *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In fact, juries have been eliminated in certain proceedings in regard to mandamus, equity, eminent domain, etc., *Holmes v. Conway*, 241 U.S. 624, 631 (1916); *Long Island Water Supply v. Brooklyn*, 166 U.S. 685, 694 (1897) and *Montana Co. v. St. Louis*, 152 U.S. 160 (1894). States have been held to be equally able to adopt innovations respecting a selection and number of jurors. Verdicts rendered by less than twelve jurors have been held proper. *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912); *Maxwell v. Dow*, 176 U.S. 581, 602 (1900) and *Deigado v. Chovez*, 140 U.S. 586, 588 (1891).

3. WHETHER THE FAILURE OF THE TRIAL JUDGE TO ALLOW THE JURY TO BE INTERROGATED IN THIS CAUSE RAISES A FEDERAL ISSUE UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

The respondent in reply to the petitioner's question number 3 would request the Court to read the petitioner's Appendix beginning with C-4. The petitioner testified that he had never seen the juror, did not know his first name and did not recognize who he was. From this, it seems logical that the juror was faced with the same situation. The petitioner states the juror gave a false answer to a *voir dire* question. However, that assumes that the juror was more aware of what was happening on the *voir dire* examination than the petitioner himself was. Now, the petitioner complains that the Judge in refusing to allow this

juror to be interrogated some nine months after the jury trial was such an abuse of discretion as to amount to a violation of petitioner's Constitutional rights. We submit that the Record standing alone fails to disclose this. It might also be pointed out that the petitioner alleges that he found out about the identity of this man some three or four days after the trial; yet, it was some nine months later that he first filed a motion to the Court in regard to this issue (Petitioner's Appendix p. A-2, Respondent's Appendix p. 2a).

CONCLUSION

For the reasons stated above, we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,
WILLIAM M. HARRIS
TERRY H. DAVIS, JR.
Of Counsel

APPENDIX

VIRGINIA:

IN THE COURT OF LAW AND CHANCERY OF THE CITY OF NORFOLK

MEYER GLAZER, Plaintiff

v.

LOUIS JOSEPH BOVE, Defendant

AT LAW

NO. 7938

GROUNDS FOR MOTION FOR A NEW TRIAL

For grounds for the motion for a new trial, plaintiff, by counsel, comes and says:

1. That he relies on each and every exception as set out in the transcript of the evidence, and for each and every motion which the Court overruled. In addition, for failure to obtain a jury that was impartial as set out in the Constitution of Virginia and the Constitution of the United States which is a denial of due process.

a. The failure to note that one of the jurors was associated in the insurance business.

b. The failure of a juror to indicate that he had done business with the plaintiff.

c. Newspaper articles with regard verdicts of the jury affecting insurance premiums.

d. The action of the jury in its final verdict.

e. Any and all other matters that may be disclosed by an examination of the jurors.

MEYER GLAZER
By /s/ LOUIS B. FINE
Of Counsel

LOUIS B. FINE, p.q.
of
FINE, FINE, LEGUM, SCHWAN & FINE
Law Building
Norfolk, Virginia

I do hereby certify that I mailed a true copy of the foregoing Grounds for Motion for a New Trial to Messrs. Taylor, Gustin, Harris, Fears & Davis, 1412 Maritime Tower, Norfolk, Virginia, this 22nd day of January, 1965.

/s/ LOUIS B. FINE
Of Counsel

Filed: January 25, 1965
/s/ L. M. CALVERT, D.C.

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Yellow Cab Corp. v. Henderson, 178 Va. 207, 15 S.E. 2d 389 (1941) 10, 11

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Nash, *The Law of Evidence, Virginia and West Virginia* (The Michie Co. 1954)	19, 20
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